RECORD AND BRIEFS.

SUPREME COURT, U.S.
AUG 21 2017

No. 16-499

In the
# Supreme Court of the United States

JOSEPH JESNER, et al.,

*Petitioners*,

v.

ARAB BANK, PLC,

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

The Alien Tort Statute ("ATS") confers jurisdiction on the federal courts to hear certain tort claims alleging violations of international law, but does not itself create any private rights of action. This Court has recognized an extremely limited number of international-law violations that are actionable through federal common-law claims. But the Court has repeatedly emphasized that, due to the sensitive foreign policy interests implicated by international-law claims—as well as the more general problems with courts recognizing private rights of action—courts must exercise "great caution in adapting the law of nations to private rights." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

The question presented is whether this Court should create a new federal common-law right of action allowing plaintiffs to bring claims against corporations under the ATS for alleged violations of international law involving terrorist financing, even though Congress and this Court have refused to recognize similar claims in the contexts of the Torture Victim Protection Act and *Bivens*.

## PARTIES TO THE PROCEEDING

Respondent Arab Bank, PLC was the defendant in the district court and appellee in the Second Circuit.

Petitioners were plaintiffs in the district court and appellants in the Second Circuit. A full list of the approximately 6,000 petitioners was filed with the Clerk's Office on October 6, 2016.

## CORPORATE DISCLOSURE STATEMENT

Arab Bank, PLC certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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## INTRODUCTION

This case exemplifies why courts must exercise "great caution in adapting the law of nations to private rights" in fashioning implied causes of action under a jurisdictional statute enacted over two centuries ago. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). The plaintiffs are 6,000 foreign citizens injured in Israel during the "Second Intifada," with no direct connection to the United States. The defendant is a foreign bank, a cornerstone of the Jordanian economy that the U.S. government has labeled a constructive partner in fighting terrorist financing. The defendant has been sued not for directly participating in terrorist attacks, but for allegedly processing financial transactions for individuals who later were placed on lists of prohibited persons. The transactions occurred in Jordan, the Palestinian Territories, and other foreign countries, with the only connection to the United States being that some transactions were dollar-denominated and cleared through U.S. banks after they checked and cleared the transactions against prohibited person lists. Plaintiffs sued neither the direct perpetrators of the attacks nor other banks involved in processing the transactions. Instead, they sued only a single foreign corporation, seeking to recover 100% of their injuries plus punitive damages from respondent alone. For over a decade, this litigation has generated diplomatic friction between the United States and the Kingdom of Jordan, one of our closest allies in a critical region.

The notion that a 1789 jurisdictional statute authorizes this extraordinary effort to recover from a foreign bank for foreign injuries allegedly traceable to

foreign transactions that were heavily regulated by multiple countries—an effort that has caused substantial diplomatic tension—beggars all belief. Respondent raised multiple grounds to dismiss this ill-founded lawsuit, and the courts below seized on one that is both straightforward and dispositive: the fact that international law imposes no relevant obligation on private corporations like respondent.

In keeping the door ajar for a narrow sliver of actions based on well-defined, specific, and universal norms of the law of nations, this Court in *Sosa* emphasized both the general need for caution in creating new causes of action, and the need for specific attention to whether international law imposes obligations on particular actors, such as individuals and corporations. The latter observation follows directly from the reality that most international obligations attach to nation-states, only a few are directed to individuals, and none is directed to artificial entities like corporations with the kind of specificity and universality *Sosa* demands. That reality is reinforced by Congress' deliberate decision to exclude corporations from the universe of defendants under the Torture Victims Protection Act and by this Court's decision to reject corporate liability under *Bivens*. The actions of Congress in enacting the only statute expressly designed to create a statutory cause of action to be brought under the ATS and the actions of this Court in the closely related task of defining the scope of *Bivens* actions strongly caution against extending international-law obligations and liabilities to corporations.

But even if this Court were disinclined to adopt a categorical rule against corporate liability, it should hold at a minimum that there is no corporate liability for the conduct at issue here. The issues involved in providing banking services under circumstances where some customers may use funds to finance terrorist attacks are serious and difficult, but they are issues that cry out for a finely tuned regulatory solution. Every nation in which respondent operates takes that regulatory responsibility seriously and imposes adaptable and evolving requirements designed to minimize terrorist financing while facilitating the provision of legitimate banking services. The role of international law, as opposed to domestic regulatory law, as to corporate entities in this area is focused on agreements among nation-states to be vigilant in enforcing their domestic regulatory regimes. The notion that there is a well-defined, universally recognized norm of international law that operates directly on corporations in this area (or that a violation of national regulatory requirements should give rise to an ATS action) is fundamentally misguided.

This lawsuit exemplifies much of what is wrong with modern ATS litigation and suffers from multiple legal flaws that provide alternative grounds for affirmance. This litigation has generated more than a decade of diplomatic friction with one of our closest allies in a vital region. The time to end this deeply flawed litigation is now. The Solicitor General recognizes as much, but his suggestion that the Court address only corporate liability and direct the Second Circuit to consider the other issues is an unusual and second-best solution. There is no obstacle to this

Court addressing other grounds for affirmance, including most obviously that this suit was brought by foreign plaintiffs against a foreign defendant to recover for foreign injuries that do not touch and concern the United States.

As initially enacted, the ATS was a modest jurisdictional measure designed for the modest, but important, purpose of avoiding diplomatic friction. As petitioners would wield it, it has become an engine for diplomatic friction, with foreign plaintiffs targeting foreign corporations in a quest for punitive damages, and international banking transactions regulated not by domestic regulators but by judge-made principles derived from a scant 33 words of jurisdictional text. Whether by limiting corporate liability or by alternative means, this Court should make clear that *Sosa* did not leave the door ajar for suits like this one.

## STATEMENT OF THE CASE

### A. Arab Bank's Critical Role in the Jordanian Economy and Anti-Terrorism Efforts

1. Respondent Arab Bank is the largest bank in Jordan, where it is incorporated and headquartered. It operates in nearly 30 countries. For decades, the Bank has been recognized as a "best" institution by industry publications. *See, e.g.*, Press Release, Global Finance, *Global Finance* Names The World's Best Banks By Region 2016 (Mar. 15, 2016), http://bit.ly/1q2z4B7; Dan Keeler & Gordon Platt, *Cover Story: World's Best Banks 2003*, Global Finance (Oct. 1, 2003), http://bit.ly/2htLGOF. The Kingdom of Jordan has described the Bank as a "pivotal force of

economic stability and security in [Jordan] and the broader region." JA461.

Arab Bank is also the largest financial institution operating in the Palestinian Territories, where it has been a development partner with the U.S. Agency for International Development, OXFAM, Save the Children Fund, Catholic Relief Services, and many other groups. C.A.App.929-30.[1] Indeed, the Bank is "the main vehicle for ... payments by the international donor community" to Palestinian organizations, C.A.App.930, and its services are used by the Israeli government to process customs clearance and value added tax revenues collected for the benefit of the Palestinian Authority, *id.*; Br. of United States as *Amicus Curiae* 20, *Arab Bank, PLC v. Linde*, No. 12-1485 (U.S.) ("U.S. *Linde* Br.").

2. Like all international financial institutions, the Bank is closely regulated by specialized agencies in every country in which it operates, including Jordan and the United States. Both nations are signatories to the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 ("Financing Convention"), which obligates nation-states to enact positive domestic law measures imposing obligations and restrictions on financial institutions to help combat terrorism financing. And both nations have taken that international-law obligation seriously.

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[1] Unless otherwise noted, citations to C.A.App. refer to the Second Circuit appendix, and citations to *Linde*.C.A.App. or *Linde*.SPA refer to the joint and special appendices in *Linde v. Arab Bank, PLC*, No. 16-2119 (2d Cir.).

Jordan has enacted domestic legislation that comprehensively regulates the Kingdom's financial institutions and prohibits money laundering and other forms of assistance to would-be terrorists. *See, e.g.*, Penal Code No. 16 of 1960, as amended by Provisional Act No. 54 of 2001, arts. 147-149; Anti-Terrorism Law No. 55 of 2006; Anti-Money Laundering Law No. 46 of 2007, art. 24; Central Bank of Jordan, Regulations of Anti-Money Laundering and Terrorism Financing, Circular No. 29/2006 (2006); Letter from the Permanent Representative of Jordan to the Chairman of the U.N. Counter-Terrorism Comm. (Mar. 24, 2006). As terrorists' efforts to obtain financing and the tools for combatting terrorism financing have grown more sophisticated, Jordanian law has evolved to ensure that the Kingdom continues to abide by its commitment and obligation to eradicate that conduct within its own borders.

The United States likewise pervasively regulates financial institutions with operations in the United States to guard against the risk of them becoming instruments of terrorism financing. For example, the Bank Secrecy Act, 31 U.S.C. §5311 *et seq.*, and its implementing regulations regulate foreign banks' dollar-clearing branches in the United States, requiring U.S. branches of foreign banks to report suspicious fund transfers. 31 C.F.R. §1020.320(a)(2)(iii). Foreign banks' U.S. branches also must establish and maintain, in connection with their correspondent banking operations, due diligence programs designed to identify and report suspicious activity. *Id.* at §1010.610(a).

The U.S. Office of Foreign Assets Control ("OFAC") maintains a constantly updated list of "specially designated nationals," including individuals and groups designated as terrorists, with whom banks operating in the United States generally must not deal. The banking industry has adopted measures to ensure compliance with those regulations, including special software to interdict illicit transfers. Consistent with the reality that efforts to use prohibited person lists are subject to human errors, and with the need for judgment calls about inexact matches and aliases, before imposing sanctions, OFAC will consider factors such as "self-disclosure, the use and sophistication of interdict software, and other bank compliance initiatives." U.S. Dep't of Treasury, *OFAC Regulations for the Financial Community* 2 (2012).

Like Jordan, the United States backs these regulatory provisions with civil and criminal prohibitions and makes providing material support to terrorist groups a federal crime. *See, e.g.*, 18 U.S.C. §§2339A-2339C. The Patriot Act, sanctions programs administered by OFAC, and other regulations similarly punish banks that fail to comply. *See, e.g.*, 31 C.F.R. §§594-97; *OFAC Regulations* 4.

The United States and Jordan are not alone in addressing terrorist financing. Every nation in which Arab Bank operates imposes significant and evolving regulations designed to minimize to the extent practicable the use of the financial system to facilitate financing of acts of terrorism. *See generally* 2 Bureau for Int'l Narcotics & Law Enf't Affairs, U.S. Dep't of State, Int'l Narcotics Control Strategy Report 40-50

(2016), http://bit.ly/2pBuVGN; *Global Network*, Arab Bank, http://bit.ly/1RE6KQK (last visited Aug. 20, 2017).

3. Arab Bank is deeply committed to fighting the scourge of terrorism. In fact, the United States has described the Bank as a "constructive partner" in "working to prevent terrorist financing," and has praised the Bank as a "leading participant" in "regional forums on anti-money laundering and combatting the financing of terrorism." U.S. *Linde* Br.20. The Bank fully complies with the many legal requirements of the countries in which it operates. It performs necessary due diligence on prospective customers and screens account applicants against blacklists provided by local regulators. Indeed, it was one of the first banks in the Middle East to introduce technology allowing local branches to screen customer names against OFAC's list, even though OFAC regulations, out of respect for territorial restrictions on bank regulation, do not require foreign entities to apply such scrutiny even today. *See Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542, 565 (E.D.N.Y. 2012).

In the United States, the Bank operated through its New York Branch (Arab Bank New York ("ABNY")), whose systems were specifically designed to comply with regulations prohibiting U.S. branches of foreign banks from engaging in transactions with individuals and entities on the OFAC list. In addition to those computerized safeguards, ABNY maintained a dedicated Compliance Department to oversee compliance with U.S. regulations and to develop and implement policies designed to curb money laundering and terrorism financing.

To be sure, just as adapting laws and regulations to effectively combat terrorism financing has been a learning process for regulators, adapting its practices and policies to effectively combat terrorism financing has been a learning process for the Bank. In 2004, ABNY came under scrutiny from the U.S. Office of the Comptroller of the Currency ("OCC") and the Financial Crimes Enforcement Network. The agencies determined that, while ABNY's internal controls sufficiently identified suspicious transactions by its accountholders, they did not sufficiently monitor transfers from non-accountholders. CA.App.1015. The Bank agreed to pay a $24 million civil penalty, and the matter was closed in 2005. C.A.App.1019.

### B. Petitioners' Fundamentally Foreign Allegations Against Arab Bank

Petitioners are thousands of foreign citizens who were victims of attacks perpetrated in Israel and its environs by Hamas and other foreign organizations and individuals over a ten-year period. Petitioners have not sued any terrorists or terrorist organizations responsible for the attacks. They have never sought relief from respondent in Israel, the location of the attacks, even though Israel has a well-functioning tort system. Nor have they sued the Bank in Jordan, where it is headquartered. Instead, petitioners sued respondent in U.S. court seeking relief under the ATS. Petitioners' counsel candidly admitted why he picked this counterintuitive forum:

> The answer is simple: ... [Y]ou cannot compare the amounts that could be awarded in America in torts cases to anything we know here [in Israel]. In the U.S., ... in addition to the damage

> compensation, *there are also enormous punitive awards, and I am talking millions.*

JA415-16 (emphasis added).

Petitioners do not allege that the Bank was involved in planning, funding, or committing the attacks that caused their injuries. At most, they allege that the Bank maintained accounts and processed transactions for foreign persons and charities affiliated with foreign terrorist organizations. They do not allege any link between the Bank's activities and *the attacks that caused their injuries.* They instead contend that the Bank's alleged provision of *general assistance* in the form of financial services to foreign persons affiliated with, or related to, foreign terrorists is sufficient.

Every Arab Bank customer account at issue was held in a foreign country, and every transaction in question was initiated or received by a foreign party. *No account at issue was held by ABNY.* At most, ABNY performed the same ministerial dollar-clearing services for some transactions that other U.S. correspondent banks performed for other transactions. In the clearing process, the transactions were processed electronically, without human intervention, through an automated clearing system that screened the names of the parties involved against the OFAC list.[2] This clearing function for dollar-denominated transactions between foreign

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[2] Although petitioners single out ABNY, many of the transactions transited through, and passed the OFAC compliance checks of, other major U.S. financial institutions. *Linde*.C.A.App.584, 650, 763, 864, 1189, 1199, 7115-17, 7122.

parties is the only thing connecting the transactions to the United States.

Petitioners' effort to exaggerate the Bank's culpability rests on obfuscation about the relevant timeline. For example, petitioners assert that the Bank "maintained accounts for numerous well-known leaders of Hamas." Pet.Br.5-6. In fact, virtually none of those individuals appeared on the OFAC list or any other relevant blacklist when the transactions were processed, and ABNY *never* held accounts for those alleged "leaders." *See Gill*, 893 F. Supp. 2d at 563-65. Indeed, to this day, nearly all of the referenced individuals have never been designated as terrorists by the U.S. government. Of course, no regulatory requirement demanded that the Bank anticipate a future listing.

Seeking to manufacture a U.S. nexus, petitioners assert that the Bank's "New York branch" processed more than $121 million in transactions "in aid of Palestinian terrorists." Pet.Br.7-8. But, with just four exceptions involving computer or human error (out of the approximately 500,000 transactions the branch processed annually), none of the identified transactions involved designated terrorists or entities on the OFAC blacklist.[3] Moreover, those transactions

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[3] In two instances, ABNY's software automatically processed the transactions because the names did not precisely match names on any government terrorist watch-list. *Linde*.C.A.App.6950, 580-83, 796. The other two transactions, involving a U.K.-licensed and headquartered charity, were erroneously released by an employee after being mistaken for false-positive OFAC matches. *Linde*.C.A.App.6771-72. The Bank self-reported this incident to U.S. authorities, which took no action against the Bank. *Linde*.C.A.App.6773-74.

were initiated by foreign parties located in foreign countries, for the benefit of other foreign parties, and merely passed through the Bank's automated electronic funds clearing facilities in New York as they would through any correspondent bank. JA173-77; *see also supra* n.2. And petitioners do not even allege that any of those transactions had any connection to the attacks that caused their injuries.

Petitioners confuse geography in their misleading assertion that the Bank "admitted" that it "processed 282 fund transfers" for individuals that the United States had designated as terrorists. Pet.Br.7. With the exception of the four mistaken transfers discussed above, those 282 transfers never transited through the United States. The OFAC list thus was inapplicable, as the transactions occurred *entirely outside the United States*.

Finally, petitioners suggest that OCC and other U.S. regulators found that the Bank transferred money to terrorists. Pet.Br.8. In fact, those regulators found only that the Bank failed to identify "certain fund transfers for further investigation," C.A.App.1018, and explicitly found that the Bank did not engage in any *knowing* wrongdoing. Instead, OCC found that the Bank "largely complied with the requirement to cease clearing funds transfers once the [Treasury Department] designated an entity as a 'specially designated terrorist,' 'specially designated global terrorist,' or 'foreign terrorist organization.'" *Gill*, 893 F. Supp. 2d at 566 (alteration in original).

### C. Proceedings Below

1. Multiple sets of plaintiffs filed complaints against the Bank between 2004 and 2010. Each

complaint made essentially the same allegations and asserted one or both of (1) claims by foreign nationals under the ATS; and (2) claims by U.S. nationals under the Anti-Terrorism Act, 18 U.S.C. §2333 ("ATA").

The Bank moved to dismiss the foreign plaintiffs' ATS claims, arguing that (1) "terrorism" is not sufficiently defined by the international community to be cognizable under the ATS; (2) plaintiffs had not pled the requisite *mens rea*; and (3) plaintiffs' claims were impermissibly extraterritorial. The district court initially denied the Bank's motion. C.A.App.783-84. After the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), 621 F.3d 111 (2010), the Bank renewed its motion, but the district court stayed the motion pending this Court's review of that decision. After this Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel II*"), 133 S. Ct. 1659 (2013), the Bank again renewed its motion, arguing that petitioners' claims failed under both *Kiobel I* and *Kiobel II*. The district court granted the Bank's motion and dismissed the ATS claims based on *Kiobel I*.

2. Petitioners appealed. The Bank argued that the judgment should be affirmed for any or all of the reasons pressed below, including the lack of corporate liability (*i.e.*, *Kiobel I*), the extraterritorial nature of petitioners' allegations (*i.e.*, *Kiobel II*), and the absence of any universal international norm against "terrorism." Petitioners' counsel acknowledged that the record was sufficient to rule on extraterritoriality. Tr. of Oral Arg. 4-5. While the Second Circuit panel found it "tempting to ... affirm[] the district court's judgments on the basis of *Kiobel II*," it ultimately

affirmed on the basis of *Kiobel I's* no-corporate liability rule. Pet.App.28a-29a.

Petitioners unsuccessfully sought rehearing en banc. In an opinion concurring in the denial, Judge Jacobs, joined by Judges Cabranes, Raggi, and Livingston, faulted the panel for "steer[ing] deliberately into controversy" by affirming solely under *Kiobel I*, Pet.App.40a, when the appeal "could have been straightforwardly decided under *Kiobel II*," Pet.App.38a. The concurring judges further concluded that petitioners had failed to adequately allege that the Bank acted with the *purpose* of violating international law. Pet.App.39a.

## SUMMARY OF ARGUMENT

I. The ATS grants federal courts jurisdiction over a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. That statute does not, however, create any private rights of action. This Court has recognized that "some, but few, torts in violation of the law of nations" may be enforced through federal common-law claims. *Sosa*, 542 U.S. at 720. But such claims are exceedingly rare and are not to be inferred lightly. Judge-made implied causes of action are *always* disfavored, and that is doubly true in the context of claims alleging international-law violations, as such claims pose grave "risks of adverse foreign policy consequences." *Id.* at 727-28. *Sosa* thus "limited federal courts to recognizing causes of action only for alleged violations of international law norms that are '*specific, universal, and obligatory.*'" *Kiobel II*, 133 S. Ct. at 1665 (emphasis added). *Sosa* further directed courts to consider whether a norm is specific,

universal, and obligatory *as to the specific defendant*, especially when recovery is sought against private individuals and corporations. *Sosa*, 542 U.S. at 733 n.20.

There is nothing remotely resembling a specific, universal, and obligatory norm of corporate liability under international law, either generally or with respect to the specific violations alleged here. For centuries, international-law norms have been primarily addressed to relations *between nations*. International law traditionally imposed few obligations on individuals. In the wake of World War II, there have been increasing efforts to extend certain international-law human rights norms to the conduct of *individuals*. But there have been only the most nascent efforts to extend norms to directly regulate the conduct of artificial entities like corporations. And there has certainly been nothing approaching the kind of specific, universal, and obligatory norm required by *Sosa*. Indeed, the international community has been remarkably reluctant to impose international-law obligations on corporations. The Nuremberg Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court all have jurisdiction over only natural persons, not corporations or organizations.

Even if such a norm existed, moreover, it would not justify the creation of a judicially inferred cause of action that extends to corporations. Because allegations of international-law violations carry "such obvious potential to affect foreign relations," *id.* at 726, this Court has emphasized that it would "look for

legislative guidance before exercising innovative authority over substantive law," *id.* at 731. And the most analogous legislative guidance from Congress is unequivocal: The Torture Victim Protection Act, the only modern statute explicitly designed to provide a cause of action to be brought under the ATS, creates a cause of action for torture and extrajudicial killing but "does not impose liability against organizations." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 452 (2012).

This Court's precedent declining to extend judge-made causes of action to corporations points in the same direction. This Court has expressly rejected corporate liability under *Bivens*, *see Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), for reasons that apply *a fortiori* here. Indeed, the concerns that carried the day in *Malesko* apply with even greater force in the ATS context, where foreign policy concerns are layered on top of traditional concerns about the proper role of the judiciary.

At a minimum, there is certainly not a specific, universal, and obligatory international-law norm applicable to corporations concerning the conduct alleged here. To the contrary, the serious and evolving challenges of combatting terrorist financing are addressed by substantial and adaptable national regulatory regimes. A corporation that violates one of those regulations does not thereby violate the law of nations, let alone any specific, universal, and obligatory provision of international law. Rather, the role of international law as to corporations in this area is limited to agreements *between nations* to ensure that their respective *national* regulatory regimes are

adequate, and that cooperation in regulating transnational transactions is the norm. International law simply does not impose obligations directly on corporations. Indeed, the very notion that the proper solution to the modern and constantly evolving problem of terrorism financing lies in a common-law action under a 200-year-old jurisdictional statute, rather than in sophisticated national regulatory regimes, defies common sense and the teaching of this Court in *Sosa* and *Kiobel*.

II. Plaintiffs' misguided effort to extend a judge-made tort to corporate defendants is just one of the fatal flaws with this lawsuit, which exemplifies many of the problems with modern ATS litigation. This Court, of course, has broad discretion to affirm on alternative grounds and has routinely done so in appropriate cases (including *Kiobel*). If the Court does not affirm the judgment below on corporate liability grounds, it should affirm on alternative grounds and put an end to this litigation once and for all.

Although Congress enacted the ATS to ameliorate friction with foreign nations, petitioners' claims have been generating diplomatic friction between the United States and one of its closest allies in a critical region of the world for *13 years*. The Solicitor General recognizes as much and urges this Court to direct the Second Circuit to address alternative grounds on remand before sending the case to the District Court. While that novel suggestion correctly recognizes the problems with letting this litigation simmer, the far better course is for this Court to put an end to this litigation itself.

There are a number of readily available grounds to affirm. Most obviously, as the United States explains, petitioners' claims are barred by *Kiobel II*. Just like the unsuccessful plaintiffs there, petitioners are foreign plaintiffs seeking relief against a foreign defendant for injuries caused by foreign actors on foreign soil. None of that has anything to do with the United States or the concerns that led Congress to enact the ATS. Under *Kiobel II*, it should be clear that this case does not touch and concern the United States. And it would be particularly appropriate for this Court to resolve the extraterritoriality question because the Second Circuit has already indicated that it considers the clearing of dollar-denominated transactions sufficient to give rise to ATS jurisdiction. That view is inconsistent with *Kiobel II*, the views of the United States, and the reality that the focus of petitioners' complaint is on conduct in Jordan and Israel, not on ministerial dollar clearing in the United States.

## ARGUMENT

### I. The Law Of Nations Imposes No Specific, Universal, And Obligatory Duty On Corporations, Either Generally Or In This Context, And Multiple Factors Counsel Against Extending Federal Common-Law Suits Under The ATS To Corporations.

#### A. This Court Has Carefully Limited the Types of International-Law Claims Enforceable Through Judicially Created Private Actions.

The ATS grants federal courts jurisdiction over a "civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. The First Congress enacted this statute in 1789 to address "only a very limited set of claims." *Sosa*, 542 U.S. at 720. In particular, Congress intended the ATS to confer jurisdiction over a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs" if no remedy were provided. *Id.* at 715.

Blackstone identified only three such offenses: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* (citing 4 William Blackstone, *Commentaries on the Laws of England* *68 (1769) ("*Commentaries*")). Those offenses, though capable of commission by individuals, were firmly grounded in "the rights subsisting between nations or states." E. de Vattel, *Law of Nations*, Preliminaries §3 (Joseph Chitty ed. and trans., 1883). For example, a nation's failure to punish an assault on a foreign ambassador, *id.* at 463-64, or its decision to harbor pirates, *see Kiobel II*, 133 S. Ct. at 1674-75 (Breyer, J., concurring in the judgment), could constitute grounds for war. Congress enacted the ATS to "ensure[] that the United States could provide a forum for adjudicating such incidents," *id.* at 1668, and thereby provide a release valve to relieve diplomatic tension and prevent a minor incident from simmering and ultimately having "serious consequences in international affairs," *Sosa*, 542 U.S. at 715.

Consistent with its narrow mission, the ATS was rarely invoked for nearly two centuries, providing jurisdiction in only a handful of cases during its first 190 years of its existence. *Kiobel II*, 133 S. Ct. at 1663

(citing cases). In 1980, however, the Second Circuit recognized a privately enforceable norm of international law forbidding state-sponsored torture. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). The court held that aliens alleging such harm could sue their torturer—there, a former official in the Paraguayan government who was physically present in the United States—in federal court under the ATS. *Id.* Although *Filartiga* involved only claims against a former state actor, that decision spawned a cottage industry of litigation in which plaintiffs brought sweeping claims against all manner of defendants—including individuals, corporations, charities, and organizations unaffiliated with any government—for their alleged roles in international-law violations allegedly occurring throughout the world. Chamber of Commerce Br.24-27 ("Chamber Br.").

This Court first addressed this modern-day effort to expand the ATS in *Sosa*. All nine Justices in *Sosa* agreed that the ATS is only "a jurisdictional statute creating no new causes of action." 542 U.S. at 724; *id.* at 743 (Scalia, J., concurring in part and concurring in the judgment) (same). The Court thus unanimously agreed that a plaintiff seeking to invoke federal-court jurisdiction under the ATS must identify some *other* source of law that provides a cause of action. For some Justices, only statutes and treaties would suffice. *See id.* at 744-51 (Scalia, J.) (arguing that federal courts have no authority to "convert[] what they regard as norms of international law into American law"). The majority, however, acknowledged a strictly limited power for federal courts to fashion causes of action under federal common law to redress a narrow band of violations of the law of nations. *Id.* at 714.

The Court's starting point was a recognition that "some, but few, torts in violation of the law of nations were understood to be within the common law" in 1789. *Id.* at 720. From that premise, *Sosa* held that the power of federal courts to infer private causes of action for violations of the law of nations was limited to international-law norms of comparable clarity and universality to the framing-era analogs. Any "claim based on the present-day law of nations" must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. *Sosa* thus "limited federal courts to recognizing causes of action only for alleged violations of international law norms that are '*specific, universal, and obligatory*.'" *Kiobel II*, 133 S. Ct. at 1665 (emphasis added). Moreover, in recognition that most international-law norms impose obligations on nation-states, not on "private actor[s] such as a corporation or individual," *Sosa* emphasized the importance of ascertaining "whether international law extends the scope of liability for a violation of [the] norm to the perpetrator being sued," *Sosa*, 542 U.S. at 733 n.20; *accord id.* at 760 (Breyer, J., concurring in part and concurring in the judgment) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.").

*Sosa* recognized that the scope of federal common law and judicially inferred causes of action has narrowed over time. Accordingly, even when there is a specific, universal, and obligatory international-law norm, courts must exercise "great caution in adapting the law of nations to private rights." *Id.* at 728-30. For example, because there is now "a general

understanding that the law is not so much found or discovered as it is either made or created," the Court emphasized that courts must "look for legislative guidance before exercising innovative authority over substantive law." *Id.* at 725-26. *Sosa* also invoked the presumption against judicial creation of private rights of action, emphasizing that such actions lack the check of prosecutorial discretion and create "possible collateral consequences," such as the "risks of adverse foreign policy consequences" that flow from cases involving international law. *Id.* at 727-28. The Court further emphasized that it had "no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728.

### B. There Is No Specific, Universal, and Obligatory Norm of Imposing International-Law Obligations on Corporations as a General Matter.

Under a straightforward application of *Sosa*, petitioners' effort to establish a new common-law tort claim against corporations fails at the threshold because there is nothing remotely resembling a specific, universal, and obligatory norm of imposing international-law obligations directly on corporations. As its very name suggests, the vast majority of obligations under the "law of nations" fall only on nation-states. From the beginning, there were international-law obligations imposed on individuals, but they were few, and limited to interactions with sovereign authorities (*e.g.*, rules for safe passage and prohibiting assaults on ambassadors) or the unique problems with areas beyond the direct control of any sovereign, like the high seas (*e.g.*, piracy).

As international human rights law has developed in the last century, there have been additional international-law obligations that attach directly to individuals. But to this day, there are no specific, universal, and obligatory international-law norms that impose duties on artificial entities such as corporations. Instead, within the world's various legal systems there is "enormous diversity in the scope and content of corporate legal responsibilities regarding human rights." U.N. Human Rights Council, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶34, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007). International law thus does not "currently impose direct legal responsibilities on corporations." *Id.* ¶44.

1. The law of nations traditionally has been "primarily a law for the international conduct of States, and not of their citizens." 1 L. Oppenheim, *International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955); *see* 4 *Commentaries* *68 ("[O]ffences against" the law of nations are "principally incident to whole states or nations"). That is evident in the "narrow set of violations of the law of nations" that historically gave rise to a cause of action under the ATS, *Sosa*, 542 U.S. at 715, each of which was firmly grounded in "the rights subsisting between nations or states," or the peculiarly international problem of piracy on the high seas. Vattel, *Law of Nations*, Preliminaries §3. As noted, Congress supplied a remedy under the ATS for that limited category of offenses because they are so inextricably intertwined "with the norms of state relationships," *Sosa*, 542 U.S. at 715, that the failure of the United States to redress

them could be viewed as a violation of the nation's own international-law obligations, or even an act of war.

In recent years, this long-recognized divide in international law between the state and the individual has been relaxed to some extent. "The singular achievement of international law since the Second World War has come in the area of human rights, where the subjects of customary international law—*i.e.*, those with international rights, duties, and liabilities—now include not merely *states*, but also *individuals*." *Kiobel I*, 621 F.3d at 118. But while the horrors of World War II spurred the international community to impose international-law obligations on *natural persons* under limited and still-evolving circumstances, no similar norm of imposing international-law obligations on corporations emerged. To the contrary, the international community has repeatedly evinced marked reluctance to subject corporations to international-law obligations or the jurisdiction of international tribunals.

For example, the Charter of the International Military Tribunal at Nuremberg, which "authorized the punishment of the major war criminals of the European Axis following the Second World War," *id.* at 132, granted the tribunal jurisdiction over only natural persons, not organizations. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. And at the Nuremberg Trials, the Allies "declin[ed] to impose corporate liability under international law in the case of the most nefarious corporate enterprise known to the

civilized world"—IG Farben, which produced Zyklon B for the Nazi gas chambers—"while [nevertheless] prosecuting the men who led" it. *Kiobel I*, 621 F.3d at 135.

As the Nuremberg Tribunal emphasized, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nurnberg Trial 1946*, 6 F.R.D. 69, 110 (1947). Indeed, when the Allies broke Farben into three successor firms, the firms "paid Farben's shareholders the face value of the portions of its capital that each successor took over, so that the seizure and dissolution of Farben actually involved no financial penalty to its owners." Br. *Amici Curiae* of Nuremberg Historians and International Lawyers 35, *Kiobel II* ("Nuremberg Historians Br.").[4]

International tribunals since Nuremberg have continued to decline to assert jurisdiction over corporations. The charters establishing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda limit the tribunals' jurisdiction to "natural persons." *See* Statute of the International Criminal

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[4] Petitioners cite a stray remark from one Nuremberg panel to suggest that corporations can violate international law. Pet.Br.31. But the reference to "juristic persons" "was entirely in dicta," as the tribunal referenced the fault of IG Farben, "but promptly said that the issue was immaterial as no corporations were charged." Nuremburg Historians Br.11-12. Indeed, the court later "walked away from its own dicta by stressing that corporations act only through individuals," *id.* at 12.

Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993), adopting U.N. Secretary-General Rep. Pursuant to Paragraph 2 of Security Council Resolution 808, art. 6, U.N. Doc. S/25704 (May 3, 1993); Statute of the International Tribunal for Rwanda, art. 5, S.C. Res. 955, art. 5 (Nov. 8, 1994).

The Rome Statute, which established the International Criminal Court, likewise limits that tribunal's jurisdiction to "natural persons." *See* The Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 37 I.L.M. 1002, 1016. Before the statute was finalized, the French delegation proposed granting the ICC jurisdiction over corporations, but the proposal met significant resistance and was withdrawn. Albin Eser, *Individual Criminal Responsibility, in* 1 *The Rome Statute of the International Criminal Court* 767, 779 (Antonio Cassese et al. eds., 2002). For some countries, "the whole notion of corporate criminal responsibility was simply 'alien', raising problems of complementarity." Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court,* in *Liability of Multinational Corporations Under International Law* 139, 157 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

2. Petitioners attempt to counter this norm of *excluding* corporations from the jurisdiction of international tribunals by noting that "at least one international tribunal has recently imposed a form of corporate criminal liability." Pet.Br.51 (discussing Special Tribunal for Lebanon). In fact, that tribunal concluded only that a corporation could be held in

contempt for willfully interfering with ongoing proceedings against individuals. *See Prosecutor v. New TV S.A.L. & Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Oct. 2, 2014). And in doing so, the tribunal expressly acknowledged that "international law has not evolved to the stage where the subjection of a corporate person to criminal liability has become imperative on States." *Id.* ¶59. Petitioners' lone example thus does not even support imposing international-law obligations on corporations. Equally important, a *lone* example would not even constitute a trend, let alone establish the kind of specific, universal, and obligatory norm *Sosa* requires.

Implicitly recognizing the complete absence of an international-law consensus favoring corporate criminal liability, petitioners contend that "civilized countries across the globe agree that corporations may be held liable in tort." Pet.Br.48. But whether the *domestic* laws of other sovereigns allow civil tort suits against corporations is irrelevant, as the ATS confers jurisdiction over actions alleging a "violation of the law of nations," not actions alleging violations of the domestic laws of foreign nations. Indeed, as Judge Friendly explained, even domestic law prohibitions that are universal do not create an actionable international-law prohibition under the ATS. *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (that "every civilized nation" has some form of law prohibiting theft does not make theft a subject of the ATS). Petitioners point to nothing approaching a specific and universal consensus favoring imposing civil liability on corporations *under international law*.

That is not surprising because international law is not principally about providing civil remedies, which is generally the office of domestic law. Thus, it is the complete lack of criminal prohibitions directly applicable to corporations that is most telling.

Moreover, the few express efforts to consider civil liability only underscore the absence of a consensus. For example, the negotiators of the Rome Statute expressly discussed but decided not to enact a provision that would have permitted civil liability for corporations. *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rep. of the Preparatory Committee on the Establishment of an International Criminal Court* 31 n.71, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998) (noting proposed "middle ground" that would "provid[e] for only the civil or administrative responsibility/liability of legal persons").

Despite the glaring absence of any consensus even today about imposing international-law obligations directly on corporations, petitioners claim that liability for artificial entities was already established in 1789. Not surprisingly, none of the handful of examples they cite supports that claim. They first point to *Skinner v. East India Co.*, (1666) 6 State Trials 710 (H.L.), a 17th-century suit against the British East India Company. But the East India Company was sui generis, operating much more like a sovereign than a private corporation; it possessed the power "to wage war and conduct diplomacy, govern over people and places, coin money," and negotiate treaties. Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies,*

*Lessons, and Limitations*, 39 Seattle U. L. Rev. 423, 433 (2016). In all events, *Skinner* was ultimately vacated by Charles II precisely because of disputes about the juridical status of the Company. *Id.* at 443.

Petitioners point to in rem actions against pirate ships. Pet.Br.25-26. But that effort conflates in rem jurisdiction and vicarious corporate liability. In rem jurisdiction over ships was designed to hold the ship's owner liable *for his own wrongs*, not to impose vicarious liability on the ship. *Cont'l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 22-23 (1960). This Court thus recognized long ago that "[t]o say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles." *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 503 (1886). A corporation, unlike a boat, is "a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001); *see also* Pet.App.47a (Cabranes, J., concurring in denial of reh'g en banc). Petitioners cannot point to any founding era decision imposing liability on such an entity.

Finally, petitioners cite two opinions of the U.S. Attorney General from 1795 and 1907. Pet.Br.24. The first involved a potential claim brought *by* a corporation *against individuals*, and thus says nothing about whether corporations were subject to international-law obligations at the time. As for the 1907 opinion, "without any analysis or citation of authority," it merely states in passing that the ATS provides "'a forum and a right of action'" for Mexican

citizens injured by violations of international law. *Kiobel I*, 621 F.3d at 142 n.44 (emphasis omitted) (quoting 26 Op. Att'y Gen. 250, 253 (1907)). That unreasoned dictum is entitled to little weight, especially given that *Sosa* expressly held that the ATS does *not* provide a "right of action." 542 U.S. at 723.

3. In a final effort to establish an international-law consensus, petitioners emphasize that some international agreements expressly contemplate corporate liability. Pet.Br.32-33, 44-45. But those agreements do not impose international-law obligations directly on corporations. Instead, consistent with the basic focus of international law, they impose international-law obligations primarily *on signatory states*, including the obligation to devise domestic law to regulate corporate responsibility for individual violations, with the exact contours of domestic law's provisions for corporate responsibility and liability generally left to the signatory state. While corporations may be regulated by the resulting domestic law, the international-law obligation operates on the state, not on the corporation. And a corporation that violates the resulting domestic law does not *ipso facto* violate international law.[5]

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[5] For example, the United States is a signatory to the International Covenant on Civil and Political Rights, which seeks to safeguard civil and political rights, including the rights to free speech, a fair trial, and freedom from arbitrary arrest or detention. *See* art. 1(2), 9, 14, 17, 19, Dec. 16, 1966, 999 U.N.T.S. 171. The United States has taken the position that the Bill of Rights puts the United States into compliance with its obligations under the ICCPR. *See, e.g.*, Fourth Periodic Rep. of the U.S. to the U.N. Human Rights Comm. ¶¶298, 322-23, 354-58, U.N. Doc. CCPR/C/USA/4 (Dec. 30, 2011),

The terrorism Financing Convention that petitioners trumpet is a case in point. The Financing Convention does not "directly impose any liability on corporations." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 325 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). It imposes *on signatory states* an obligation to "take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence" that meets the convention's definition of terrorist financing. Financing Convention, art. 5. As the Governments of the United Kingdom and the Netherlands have explained, such "treaties do not suddenly create some *general direct duty* of corporations to obey the rules of international law imposed on States." Br. of the Gov'ts of U.K. and Neth. as *Amici Curiae* 15, *Kiobel II* ("U.K. and Neth. Br.").

That distinction is critical to the analysis under *Sosa*. The fact that the international agreement most pertinent to this dispute imposes international-law obligations primarily on signatory states and leaves the scope of corporate responsibility to the signatory states underscores that there are no specific, universal, and obligatory international-law obligations on corporations, either generally or in this

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http://bit.ly/2i9m11I. But that does not mean that every violation of the Bill of Rights now constitutes a violation of international law as well. *See Sosa*, 542 U.S. at 736 (rejecting a rule that "would create a cause of action for any seizure of an alien in violation of the Fourth Amendment").

context. To the contrary, the Financing Convention directs signatory states to adopt domestic regulations to address corporate liability precisely because international law has not yet reached any consensus about whether or how to regulate corporations under international law itself.[6] Petitioners thus have failed to establish the essential threshold prerequisite for establishing a federal common-law cause of action based on the law of nations. There is simply no specific, universal, and obligatory international-law duty on "the perpetrator being sued." *Sosa*, 542 U.S. at 733 n.20.

### C. Subjecting Corporations to International-Law Obligations Would Flout Congressional Intent and Contravene This Court's Precedent in the Highly Analogous *Bivens* Context.

1. Petitioners' failure to establish a specific, universal, and obligatory norm of corporate liability is reason enough to affirm the dismissal of their suit.

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[6] Notably, the ATA, the law through which Congress has fulfilled the United States' obligation under article 5 of the Financing Convention, creates a cause of action that may be brought against corporations but does not allow aliens to sue. *See* 18 U.S.C. §2333(a). And Congress has declined to enact proposed legislation that would amend the ATA to eliminate its restriction to claims brought by "nationals of the United States." *See, e.g.*, D. Amdt. 2523 to S. 1197, 113th Cong., 159 Cong. Rec. S8516-20 (Daily ed. Nov. 21, 2013). That not only underscores Congress' disinclination to open U.S. courts to terrorism-related claims with little or no nexus to the United States, but also defeats any suggestion that declining to provide an action for claims like petitioners' would violate the international-law obligations of the United States.

But nearly every "cautionary" factor *Sosa* identified about the delicate task of inferring federal common-law causes of action also counsels against inferring a cause of action here. Because of the "obvious potential to affect foreign relations," *id.* at 731, *Sosa* directed courts to carefully "look for legislative guidance before exercising innovative authority over substantive law," *id.* at 726. Congress has enacted only one modern-day statute expressly designed to create a statutory cause of action that could be brought under the ATS. That singular statute should carry unique weight in fashioning judicial actions. The fact that it conspicuously *excludes* corporations from its reach should all but decide the question presented.

In the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 105-256, 106 Stat. 73 (codified at 28 U.S.C. §1350 note), Congress created an express cause of action for violations of human rights norms, allowing both U.S. persons and aliens to bring suit for torture and extrajudicial killing. 28 U.S.C. §1350 note, §2. The TVPA was enacted when it was still unclear whether courts had authority to recognize a private cause of action for violations of international law, *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring), or instead had to wait for Congress to provide "an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal," *id.* at 801 (Bork, J., concurring). In response to Judge Bork's view that "separation of powers principles required an explicit ... grant by Congress of a private right of action," the TVPA was enacted to "provide such a grant." S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 3-4 (1991).

Critically, as this Court has recognized, the TVPA "does not impose liability against organizations." *Mohamad*, 566 U.S. at 451. Instead, when Congress decided to create an express cause of action to allow victims of the most glaring human rights abuses to seek relief pursuant to the jurisdiction granted by the ATS, it made clear that they could seek damages only against other natural persons. As this Court noted in *Mohamed*, "Congress appeared well aware of the limited nature of the cause of action it established in the Act." *Id.* at 460.

2. The TVPA dooms petitioners' attempt to establish a cause of action against corporations. Not only does Congress' conscious exclusion of corporations from the TVPA's reach confirm the absence of any "specific, universal, and obligatory" international-law norm of corporate liability; Congress' decision to limit TVPA liability to individual defendants also gives the lie to petitioners' insistence that whether to recognize a cause of action in the ATS context turns only on the nature of the act, not the identity of actor. *But see Sosa*, 542 U.S. at 733 n.20. Indeed, this Court made that very point in *Kiobel II*, invoking *the TVPA* as evidence that determining "who may be liable" for violating an international-law norm not only is part of the process of "defining a cause of action," but "carries with it significant foreign policy implications." 133 S. Ct. at 1665.

Petitioners therefore badly miss the mark in emphasizing that nothing in the text *of the ATS* excludes corporations. Pet.Br.19-20. The ATS' failure to address corporate defendants expressly simply reflects that the ATS, as this Court unanimously

concluded in *Sosa*, only *confers jurisdiction*; it does not create a cause of action. *Sosa*, 542 U.S. at 724. As a jurisdictional statute, the ATS addresses the subject matter over which federal-court jurisdiction is established, not the question of which individuals or entities are proper defendants. The latter is work typically done by the *cause of action*, not the font of jurisdiction. For example, the federal anti-discrimination laws apply only to employers with more than 15 employees. *See* 42 U.S.C. §2000e(b). Unsurprisingly, that limitation on the types of defendants who may be sued is found in Title VII (which creates the cause of action), not 28 U.S.C. §1331 (which confers federal-question jurisdiction). Thus, what matters is not that the jurisdictional provision does not expressly address appropriate defendants; that is to be expected. What matters is that the subject matter over which the ATS confers jurisdiction (violations of duties under the law of nations and treaties) does not reach corporations, and that in enacting the sole cause of action expressly created specifically to utilize that subject-matter jurisdiction (the TVPA), Congress expressly excluded corporate defendants.[7]

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[7] To be sure, there are some jurisdictional provisions that turn on the nature of the defendant, but that is because federal jurisdiction under those provisions turns not on the subject matter of the suit, but on some unique feature of the defendant, such as status as a federal officer or foreign ambassador. The ATS is plainly not such a provision, but instead confers federal jurisdiction based on the identity of the plaintiff (an alien) and the subject matter of the suit (for tort only, committed in violation of the law of nations).

The TVPA underscores that petitioners' repeated refrain that corporate liability is the norm for violations of *domestic* law is beside the point. The ATS does not confer jurisdiction over all manner of torts; it confers jurisdiction over only those torts that involve a "violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. The best evidence of congressional intent with respect to corporate liability in that narrow sphere is the lone federal statute enacted for the express purpose of establishing a cause of action for a violation of the law of nations. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975) (looking to "the bounds [Congress] delineated for comparable express causes of action" when determining whether to recognize a new cause of action). And in that statute, Congress decided that corporations should *not* be subject to liability.

"It would indeed be anomalous to impute to Congress an intention to expand" other international-law offenses "beyond the bounds [Congress] delineated for" the TVPA. *Id.*; *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 574 (1979) ("[W]e are extremely reluctant to imply a cause of action in §17(a) that is significantly broader than the remedy that Congress chose to provide" in an analogous statute). Doing so would produce results that Congress cannot possibly have intended. As Judge Kavanaugh explained, allowing private claims alleging international-law violations to be brought against corporations would "produce[] the rather bizarre outcome that *aliens* may sue corporations in U.S. courts for ... torture and extrajudicial killing, but *U.S. citizens* may *not* sue U.S. corporations for ... torture and extrajudicial killing." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 88 (D.C. Cir.

2011) (Kavanaugh, J., dissenting in part). It is simply "implausible to think that Congress intended such a discrepancy. And it is inconsistent with *Sosa* to enshrine such a discrepancy into ATS case law." *Id.*; *see also* Chamber Br.21-22.[8]

3. This Court's refusal to recognize a cause of action against corporations under *Bivens* likewise militates against recognizing a cause of action against corporations under the ATS. *Bivens* and the ATS both involve the judicial inference of causes of action, and this Court has emphasized the need for caution in both contexts. Thus, this Court's refusal to infer corporate liability in the *Bivens* context strongly supports declining to infer such liability under the ATS. Indeed, much of the Court's reasoning in *Malesko* is directly applicable in the ATS context.

*Bivens* claims closely resemble tort claims alleging violations of international law, as both are judge-made common-law rights of action. *Compare Kiobel II*, 133 S. Ct. at 1666 ("The question under *Sosa* is ... whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law."), *with Malesko*, 534 U.S. at 66 (describing *Bivens* as "an implied private action for damages against federal officials alleged to have violated a citizen's constitutional rights"). Moreover,

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[8] That result would be all the more bizarre given that the ATA permits corporate liability for claims brought by U.S. nationals *but not by aliens*. *See supra* n.6. And if the courts drew guidance from ATA standards in fashioning rules for closely related ATS actions by aliens, the result would be directly contrary to Congress' repeated judgment not to extend the ATA cause of action to aliens. *Id.*

both regimes were created to ensure that aggrieved parties had at least one "avenue for some redress." *Malesko*, 534 U.S. at 69; *Kiobel II*, 133 S. Ct at 1668 ("The ATS ensured that the United States could provide a forum for adjudicating" offenses that "if not adequately redressed could rise to an issue of war."). As Justice Scalia noted in *Sosa*, "*Bivens* provides perhaps the closest analogy" to common-law claims alleging violations of international law. 542 U.S. at 743 (Scalia, J.).

This Court has specifically declined to recognize *Bivens* suits against corporations. In *Malesko*, the plaintiff sought to bring a *Bivens* claim not against "the principal wrongdoer" who had harmed him, but against that individual's employer (the corporate operator of a privately owned prison). 534 U.S. at 66. The Court held that a *Bivens* action against an individual was "fundamentally different from" an action against his corporate employer, and "refused to extend *Bivens* liability to ... [this] new category of defendants," *id.* at 70, 68. The Court concluded that the plaintiff's "remedy ... against the individual" was "sufficient," and that the plaintiff's desire for more "complete relief" did not justify "imply[ing] a new constitutional tort." *Id.* at 72, 69, 66.

The Court was unmoved by the argument that corporate liability is essential to discourage violations of constitutional rights, noting that corporate liability does not necessarily equate to better conduct by employees. "For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Id.* at 71. And if there were "no reason

for aggrieved parties to bring damages actions against individual officers," then "the deterrent effects of the *Bivens* remedy would be lost." *FDIC v. Meyer*, 510 U.S. 471, 485 (1994). Thus, even if deterrence is one of "the more general purposes of the ATS," petitioners' unsupported assertion that corporate liability is "necessary to effectuate" it, Pet.Br.25, simply does not follow.

In sum, while a corporate defendant might be a more attractive deep-pocket target for international-law claims, *see Malesko*, 534 U.S. at 71 (noting that "corporations fare much worse before juries than do individuals"), and U.S. damages laws might be uniquely attractive to plaintiffs, *see* JA415-16, those are hardly sufficient reasons for this Court to craft expansive new common-law causes of action in an area fraught with foreign relations risks.

### D. Corporate Liability Exacerbates the ATS' Inherent Risks of Interfering With Foreign Policy and International Comity.

"[T]he practical consequences of making" a cause of action against corporations "available to litigants in the federal courts," *Sosa*, 542 U.S. at 732-33, also weigh heavily against doing so. There are many "good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" under the ATS. *Id.* at 725. Chief among them is that recognizing "new norms of international law" could "raise risks of adverse foreign policy consequences." *Id.* at 728. Those risks are particularly acute if ATS liability is extended from natural persons to artificial entities like corporations.

While it is generally impossible to exercise jurisdiction over individuals unless they are present in the United States (in which case their presence here may raise concerns that the United States is violating its own international-law obligations), it is far easier to establish jurisdiction over corporations headquartered abroad. But as this case well illustrates, adjudicating the conduct of foreign corporations in U.S. courts can generate the precise diplomatic friction that the ATS was designed to ameliorate.

1. ATS plaintiffs often name corporations as defendants in a thinly veiled attempt to recover for alleged bad acts performed by *other* individuals or governments. After this Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), that the ATS does not provide jurisdiction over foreign states, ATS plaintiffs increasingly targeted "corporations as proxies for what are essentially attacks on [foreign] government policy." Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 102, 107. Indeed, numerous ATS suits have alleged that a corporation has aided or abetted bad acts committed by a *foreign government and its officials*. For example, in *Doe v. Exxon*, "Indonesian citizens ... allege[d] that they (or their family members) were imprisoned, beaten, abused, and in some cases killed in Indonesia by Indonesian soldiers." 654 F.3d at 71 (Kavanaugh, J.). Plaintiffs, however, "did not sue Indonesia or Indonesian officials." *Id.* Instead, they sued Exxon, alleging that, because the soldiers provided security for Exxon, the corporation had aided and abetted the torts of Indonesian officials. *Id.*

The *Exxon* plaintiffs are by no means alone in using corporations as proxies to advance claims that challenge the actions of foreign governments and officials. *See, e.g.*, *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43, 549 (S.D.N.Y. 2004). As the United States has recognized, aiding and abetting suits under the ATS have given plaintiffs "a clear means for effectively circumventing" critical limits on foreign sovereign immunity. Br. for United States as *Amicus Curiae* 15, *Am. Isuzu Motors v. Ntsebeza*, No. 07-919, (U.S.) ("U.S. *Ntsebeza* Br.").

2. Plaintiffs also routinely name corporations as defendants in an attempt to find a deep-pocketed party to sue even when *other individuals* were plainly the direct cause of their harm. Remarkably, petitioners seem to view this as a virtue rather than a vice, noting that suits against multinational corporations can substitute for suits against individuals who are "often beyond the personal jurisdiction of U.S. courts." Pet.Br.26.[9] That gets matters exactly backwards and converts the ATS into a cause of, rather than a salve for, diplomatic friction.

Here, for example, petitioners did not sue the individuals or organizations that carried out the terrorist attacks. If those individuals were present in the United States, the failure to provide petitioners a remedy might generate the kind of diplomatic friction the ATS was designed to ameliorate. But allowing

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[9] If suits against multinational corporations can be used to circumvent personal jurisdiction limitations on suits against individuals, it is quite unlikely that such suits will be "rare," as petitioners suggest elsewhere in their brief. Pet.Br.53-54.

petitioners to bypass those directly responsible and sue a corporation headquartered and chartered in Jordan has the opposite effect. Not providing a remedy in the United States against a Jordanian corporation could not possibly violate any international-law obligation of the United States. But allowing non-U.S. citizens to sue a Jordanian corporation in New York for events taking place in the Middle East would convert the ATS into a source of the very diplomatic tension it seeks to avoid.[10]

3. Unsurprisingly, ATS suits suing corporations in an effort to question the acts of foreign governments and officials, or to get around personal jurisdiction constraints, have profound foreign policy and international comity implications and often generate vigorous protests from foreign governments. In just "the past two decades, various sets of plaintiffs have brought over 150 ATS suits against U.S. and foreign corporations in more than 20 industry sectors, targeting business activities in over 60 countries, including countries that are close U.S. allies." Chamber Br.34. Those cases include suits against corporations for their work with the Governments of Indonesia, South Africa, and Papua New Guinea, each of which created significant conflict between the

[10] The Financing Convention reflects this same dichotomy. The Convention includes multiple provisions ensuring that a signatory state does not harbor an individual who has personally engaged in a terrorism financing offense, arts.9-11, but leaves corporate liability to the domestic law of signatory states, art.5, and cautions against interference in the domestic affairs of co-signatories, art.20.

United States and the government in question. *See Exxon*, 654 F.3d at 77-78 (Kavanaugh, J.).

Similarly, "[t]he Canadian government objected to an ATS suit against a Canadian corporation for conduct that occurred in Sudan, explaining that the suit interfered with Canada's foreign relations." *Id.* at 77. "And several other nations—including the United Kingdom, Switzerland, and Germany—have complained that the ATS improperly interferes with their rights to regulate their citizens and conduct in their own territory." *Id.* at 78; *see also* U.K. and Neth. Br.27. In response to those diplomatic objections, the United States in 2008 asked this Court to end ATS suits that "challeng[e] the conduct of foreign governments toward their own citizens in their own countries ... through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments." U.S. *Ntsebeza* Br.5.

The *Ntsebeza* litigation provides a prime example of how ATS suits can damage U.S. relationships with other nations. There, plaintiffs sought $400 billion from corporations that had conducted business with the South African government during apartheid. *Id.* at 2. The United Kingdom, joined by Germany, declared that "[s]uch litigation can interfere with national sovereignty, create legal uncertainty and costs, and risks damaging international relations with several affected foreign countries including close allies of the United States." *Id.* at 3a. And the Government of South Africa spent years decrying the litigation as inimical to "the policy embodied by its Truth and Reconciliation Commission." *Sosa*, 542 U.S. at 733

n.21. Despite those vehement protests from the United States and several other affected nations, it took "[n]early a decade and a half" for this sprawling litigation to be dismissed. *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 163 (2d Cir. 2015).

This case itself has dragged on for over a decade, and has caused substantial diplomatic friction between the United States and one of its closest allies in a critical region. While this Court can address the excesses of modern ATS litigation through other means, such as reaffirming *Kiobel II*, eliminating aiding and abetting liability, and the like, *see infra* Part II, it would be a mistake to view the issue of corporate liability as collateral to the solution. Vicarious corporate liability is the means by which plaintiffs impose a form of aiding and abetting liability and assert jurisdiction over corporate entities chartered abroad. Simply put, a world in which ATS actions were limited to individual defendants subject to the personal jurisdiction of U.S. courts would return the ATS to its roots. Such an ATS would provide a remedy that would avoid diplomatic friction by ensuring that the United States is not harboring individuals who have directly violated international law. But the ATS would no longer be a vehicle for attempting to collect from artificial entities chartered abroad that are often important mainstays of their home country economies. In short, refusing to extend corporate liability would go a long way to curing the most problematic features of modern ATS litigation.

### E. At a Minimum, This Court Should Reject Corporate Liability for the Claims at Issue Here.

Even if there might be some circumstances in which international law could be understood to impose obligations directly on corporations, the context of this case is not one of them. The Financing Convention and related international agreements speak directly to how the international community has chosen to address the thorny and rapidly evolving issue of terrorism financing: through agreements among nation-states to promulgate domestic-law regulations that govern financial institutions operating in each signatory state. *See* Financing Convention, art. 5 (requiring signatory states to enact measures, consistent with their domestic law, and of a "criminal, civil or administrative" nature to hold a "legal entity" responsible for offenses committed by a person in management or control position); art. 20 (directing signatory states to implement treaty "consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States"). This national-law regulatory approach can evolve with new technologies and emerging best practices. It can allow expert regulators to tailor remedies to specific circumstances. As compared to regulating through judge-made determinations based on 33 words of 200-year-old jurisdictional text and non-existent international-law norms for corporate conduct, the regulatory approach has everything to recommend it.

Every nation in which Arab Bank operates—including the United States—takes seriously its

obligation to combat terrorism financing through positive domestic law and regulatory oversight. Accordingly, there is already an intricate lattice of statutes and regulations that address the precise matters petitioners seek to have a jury adjudicate by applying international-law norms. For example, the Patriot Act, the OFAC sanctions regime, and finely reticulated banking regulations forbid the use of the U.S. financial system by terrorists and authorize regulators to punish banks that fail to comply. *See, e.g.*, 31 C.F.R. §§595-97. Those detailed regulatory programs specifically addressing financial transactions are backstopped by criminal laws forbidding material support to terrorist groups. *See, e.g.*, 18 U.S.C. §§2339A-2339C.

Critically, each of those governmental remedies allows for prosecutorial or regulatory discretion in an area fraught with foreign policy considerations to which the plaintiffs' bar will pay no heed. *See RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016); *Sosa*, 542 U.S. at 727. That prosecutorial discretion is essential in the context of multinational corporations, which cannot possibly micro-manage the conduct of each of their thousands of employees and customers. *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 Geo. L.J. 2161, 2198 (2012). If a bad actor uses a well-run bank to send a wire transfer in the course of committing his bad acts, the government may deem a regulatory sanction sufficient. But private plaintiffs will have no such qualms, so a bank may be threatened with catastrophic ATS damages in U.S. court any time its services are abused.

Accordingly, even if this Court were disinclined to adopt a categorical rule against corporate liability in ATS suits, it should still reject corporate liability for the conduct alleged here. Simply put, in no rational world should the vagaries of a federal common-law tort informed by international-law norms addressed to nation-states be used to determine whether an international bank is doing a good enough job of regulating and overseeing trillions of dollars a day of transactions that happen to be denominated in U.S. dollars. The corporate form lends itself to regulatory solutions and multinational regimes, not ad hoc (and post hoc) decrees from courts halfway around the world.

## II. This Court Should Affirm The Judgment Below Regardless Of How It Resolves The Question Of Corporate Liability.

This Court has broad discretion to affirm a judgment on alternative grounds, *see, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989); *Kiobel II*, 133 S. Ct. at 1663, and this is a manifestly appropriate case in which to exercise that discretion. Both the United States and the Kingdom of Jordan have emphasized for years that this litigation is undermining Jordan's sovereignty and economy, threatening the U.S. government's relationship with a critical ally, and harming U.S. foreign-policy interests throughout the Middle East. This case embodies all of the worst aspects of ATS litigation and should be promptly brought to an end.

### A. This Case Continues To Undermine Jordanian Sovereignty and U.S. Foreign Policy.

Even the mere "potential" for adverse foreign-policy consequences is reason for caution in ATS cases. *See Sosa*, 542 U.S. at 727-28. But there is no need for speculation about potential here. For *years*, both the Kingdom and the United States have been expressly telling the judiciary that this litigation is subverting a crucial bilateral relationship and jeopardizing U.S. foreign-policy interests.

The Jordanian government filed a brief in the Second Circuit "strenuously oppos[ing] the overly broad assertion of extraterritorial jurisdiction" by a U.S. court over "a foreign defendant's alleged activities in foreign jurisdictions that purportedly contributed to a foreign injury." Br. of Jordan as *Amicus Curiae* 3, *Jesner v. Arab Bank*, No. 13-3605 (2d Cir.). Jordan, a nation whose "interest in this case is as deep as possible," *id.* at 2, cautioned that allowing petitioners' "claims to go forward would be a grave affront to Jordan's sovereignty," *id.* at 6. Petitioners' ATS claims "demean Jordan's (and other nations') sovereign role in regulating Jordan's largest financial institution within their territories." *Id.* at 20-21. And that "affront" to Jordan's sovereignty "is particularly galling because Jordan is an active and aggressive partner in combating the funding of international terrorism—and has staunchly encouraged its leading financial institution to do so as well." *Id.* at 21.

The staggering damages sought by petitioners could imperil the Bank's continued viability, which would create destabilizing shocks in Jordan and

elsewhere. The Bank is the largest financial institution in Jordan; its market capitalization has accounted for up to *one-third* of the Amman Stock Exchange; and the primary pension fund for Jordan's labor force owns approximately 16% of the Bank's shares. *Id.* at 2. The Bank is the primary conduit through which international donors make payments to Palestinian relief organizations, and the means through which the Israeli government deposits customs clearance and value added tax revenue for the benefit of the Palestinian Authority.

The U.S. government has recognized on multiple occasions the grave foreign policy consequences of allowing these ATS claims to proceed. In response to the threat posed by ISIS, Jordan "regularly conducts air missions over Iraq and Syria." U.S.Br.31. Jordan "cooperates with measures to thwart the financing of terrorist activities, and plays a critical role in international efforts to stem the flow of foreign terrorist fighters." *Id.* Petitioners' ATS claims "have already caused significant diplomatic tensions" with a country that is a "key counterterrorism partner." *Id.* at 30-31. The "unwarranted continuation of petitioners' claims" would "undercut U.S. foreign policy interests" by further antagonizing a nation that has been a critical partner in the fight against terrorism. *Id.* at 32.

*Any* further proceedings in this case would only exacerbate those grave foreign policy concerns. Indeed, even *discovery* in this and related litigation

has led to significant diplomatic friction.[11] During discovery, petitioners sought records regarding foreign accounts that Jordanian, Lebanese, Palestinian, U.K., French, German, and other foreign laws prohibited the Bank from disclosing. Rather than respecting the foreign sovereignty interests at stake, the district court issued an extraordinary order *sanctioning the Bank* for refusing to make disclosures that would have violated foreign law. *Linde v. Arab Bank, PLC*, 269 F.R.D. 186 (E.D.N.Y. 2010). Under the sanction order, the jury would be instructed that it could infer from the withheld documents that the Bank knowingly and purposefully provided financial services to terrorists.[12]

Unsurprisingly, that order triggered a host of diplomatic protests. The Jordanian government wrote to then-Secretary of State Clinton to explain that the "nature and severity of the sanctions imposed against Arab Bank and the U.S. court's interpretation of Jordanian banking laws raise serious national

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[11] The discovery process was consolidated with cases raising ATA claims against the Bank.

[12] The Bank sought certiorari after the Second Circuit denied its mandamus petition seeking review of the sanctions order. *Arab Bank v. Linde*, No. 12-1485 (cert. denied June 30, 2014). This Court called for the views of the Solicitor General, who argued that the sanctions order was erroneous in several respects but that the issues could be resolved after final judgment. This Court denied certiorari. On remand, the district court dismissed the considered views of the Solicitor General as dictum, and the ATS claims proceeded to trial, where the sanctions order all but directed the jury to enter a verdict against the Bank. The Bank's appeal of that judgment remains pending before the Second Circuit. *See Linde v. Arab Bank*, No. 16-2119 (2d Cir. argued May 16, 2017).

security concerns for the Kingdom." JA461. Lebanon's government emphasized that the sanctions order "violates principles of mutual respect for the laws of sovereign nations and puts a commercial enterprise in a untenable position of having to choose between breaking the laws of our Republic where it operates and being subject to severe sanctions in a courthouse in the United States for doing so." JA454. Palestinian authorities warned that, as a result of the sanctions order, the "impact on the banking system and the economy in the Palestinian Territories will be dramatic, the means of eliminating illegal banking activity will be thwarted, and the potential risk of that activity will be elevated." JA459.

### B. There Are Multiple Independent Grounds for Affirmance.

1. This Court initially granted certiorari in *Kiobel* to address whether the ATS provides jurisdiction over claims against corporations, the same question presented here. But the Court ultimately declined to reach that question because the plaintiffs' claims involved an impermissible extraterritorial application of the ATS. The same course would make sense, *a fortiori*, in this case.[13]

*Kiobel* involved claims brought by Nigerian plaintiffs alleging that foreign corporations aided and abetted law-of-nations violations that occurred in Nigeria, thereby injuring the plaintiffs in Nigeria. 133

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[13] As the United States correctly notes, "[b]oth parties ... briefed the extraterritoriality issue" below, "both parties ... represented to the [Second Circuit] that the record was sufficient to decide it," and "both parties ... urged the court to decide it." U.S.Br.4.

S. Ct. at 1662. The foreign corporations raised funds in the United States, listed shares on a U.S. stock exchange, maintained an office in the United States, and had been held subject to the general jurisdiction of U.S. courts. *Id.* at 1677-78 (Breyer, J.); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 93-99 (2d Cir. 2000). Notwithstanding those U.S. connections, this Court concluded the plaintiffs' claims were impermissibly extraterritorial because "all the relevant conduct took place outside the United States." *Kiobel II*, 133 S. Ct. at 1669. As the Court held, it is not enough merely to allege some tangential connection to the United States; the plaintiff must show that the ATS claims "touch and concern the territory of the United States ... *with sufficient force*" to displace the presumption against extraterritoriality. *Id.* (emphasis added).

This case is *Kiobel* all over again. Just like the unsuccessful plaintiffs there, petitioners are foreign plaintiffs seeking relief against a foreign defendant for injuries that occurred on foreign soil. Petitioners are "victims of terrorist attacks ... that took place between 1995 and 2005 in Israel, the West Bank, and Gaza." Pet.Br.9. Respondent is a foreign financial institution "majority owned and controlled by the shareholders of Arab Bank Group, a Jordanian holding company." JA167. Petitioners allege that the Bank violated international law by providing financial services to *foreign* individuals and charities that supported or were affiliated with other *foreign* organizations and individuals that allegedly supported terrorist attacks in Israel. Pet.Br.6-7.

Petitioners' sole effort to assert a U.S. connection involves a ministerial aspect of banking services. Like the vast majority of dollar-denominated wire transfers that occur worldwide, some of the Bank's wire transfers were electronically routed through New York (without human intervention) via the Clearing House Interbank Payments System, through which 1.5 trillion dollars pass every day. *See CHIPS*, The Clearing House, http://bit.ly/2rNPJgL (last visited Aug. 18, 2017). But that brief detour through New York does not change the fact that all of those wire transfers were initiated by foreign parties located in foreign countries, for the benefit of other foreign parties. JA173-77. As the United States explains, "[i]n the context of the ATS, ... the automated domestic clearance of dollar-denominated transactions in isolation does not in itself constitute a sufficient domestic nexus for recognizing a common-law claim." U.S.Br.28; *see also Morrison v. Nat'l Austl. Bank Ltd*, 561 U.S. 247, 266 (2010) ("the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case").

This Court's recent decision in *RJR Nabisco, Inc. v. European Community* confirms that petitioners' claims do not sufficiently "touch and concern" the United States. In *RJR*, the Court explained that when a statute (as with the ATS) is not expressly extraterritorial, a permissible domestic application of the statute exists only "[i]f the *conduct relevant to the statute's focus* occurred in the United States." 136 S. Ct. at 2101 (emphasis added). This Court "has always identified a statute's 'focus' to be something explicitly mentioned in the statute's text." Note,

*Clarifying Kiobel's "Touch and Concern" Test*, 130 Harv. L. Rev. 1902, 1912 (2017).

As its plain text makes clear, the ATS is focused on "torts" committed against aliens. While an ATS tort must be committed in violation of international law, *see* 28 U.S.C. §1350, no tort is premised on wrongful conduct alone. Rather, a "tort is the product of wrongful conduct *and of resulting injury*." *Sosa*, 542 U.S. at 705 n.3 (emphasis added); *see also* 3 *Commentaries* *117 (defining "tort" as involving "injury done to ... person or property"). The "relevant conduct" in the ATS context thus includes *both* the international-law violation *and* the injury that flows from it. *See Kiobel II*, 133 S. Ct. at 1688 (Congress enacted ATS because "[t]he United States was ... embarrassed by its potential inability to provide judicial relief to foreign officials *injured in the United States*" (emphasis added)). Here, both the alleged international-law violations and petitioners' injuries occurred abroad. Indeed, the latter is not even debatable; petitioners do not and cannot assert that the *injuries* for which they seek relief occurred in the United States.

Petitioners chose to bring their fundamentally extraterritorial claims halfway around the world in U.S. court not because of any meaningful connection to the United States, but in a transparent attempt to forum shop. Petitioners have never disputed that they could have attempted to seek relief through tort claims in Israel, where the attacks occurred. In a revealing moment of candor, petitioners' counsel explained why he brought suit in the United States rather than Israel: "In the U.S., ... in addition to the damage

compensation, *there are also enormous punitive awards, and I am talking millions.*" JA415-16 (emphasis added).[14] The ATS was enacted to provide a remedy for international-law violations where the connection to the United States is significant enough that the failure to provide a remedy could result in the United States being drawn into war or being accused of harboring enemies of mankind. The statute was not designed to lure in disputes that do not touch and concern the United States with the promise of punitive damages—particularly when the country that *does* have a strong interest in the dispute supplies its own remedies through a well-functioning judicial system.

2. Adjudication of this case also would force federal courts to wade into profoundly sensitive foreign-policy issues regarding the Israeli-Palestinian conflict—a role that U.S. courts are manifestly unsuited to play.

The "nuances of the foreign policy of the United States ... are much more the province of the Executive Branch and Congress" than of the judicial branch. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000). "It is hard to conceive of an issue more quintessentially political in nature than the ongoing Israeli-Palestinian conflict, which has raged on the world stage with devastation on both sides for

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[14] *But see Sosa*, 542 U.S. at 733 n.21 (noting European Commission's view that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant *must have exhausted any remedies available in the domestic legal system*") (emphasis added); *accord Kiobel II*, 133 S. Ct. at 1677 (Breyer, J.) (noting availability in ATS cases of doctrines of "comity, exhaustion, and *forum non conveniens*").

decades." *Doe I v. Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005). Yet petitioners' claims would draw U.S. courts into just that thicket. Their claims hinge on the allegation that "an entity connected to the *Saudi Arabian government*"—a close U.S. ally—served as the "'paymaster' for Hamas and other terrorist organizations." Pet.Br.7, 10 (emphasis added). Indeed, petitioners include *soldiers in the Israeli military* who were attacked in the line of duty. *See, e.g.*, JA 111, 118, 150. Adjudication of petitioners' claims would force U.S. federal courts to sift through years' worth of attacks in Israel, the West Bank, and the Gaza Strip during the "Second Intifada" to determine which merit condemnation as "terrorism" (perhaps even state-sponsored terrorism) and which do not. Needless to say, U.S. courts are manifestly ill equipped to act as intermediaries in one of the most sensitive and intractable international conflicts of modern times.

3. Although the extraterritorial nature and adverse foreign-policy consequences of petitioners' claims are the most glaring legal defects, they are by no means the only ones.

Petitioners assert that "the financing and rewarding of terrorism ... lie[s] at the core of the ATS's concerns." Cert.Pet.21. To the contrary, ATS claims based on "terrorism" and terrorist financing "fail ... because no universal norm against 'terrorism,'" let alone terrorist financing, "exist[s] under customary international law." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 125 (2d Cir. 2013). While it is easy to decry terrorism, defining precisely what conduct constitutes terrorism,

especially in terms that generate universal agreement, has proven much tougher. Even NATO and the U.N. have struggled to define terrorism. *See United States v. Yousef*, 327 F.3d 56, 107 n.42 (2d Cir. 2003). And the parties to the Rome Conference expressly withheld jurisdiction over "terrorism" from the International Criminal Court because they failed to agree on a definition of that term. *See* Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 Mich. St. Int'l L. Rev. 219, 223 (2012). In short, "[w]ith so much continuing disagreement about the nature of terrorism, and, a fortiori, the nature of terrorist financing, there can be no customary international law norm, and certainly not a widely accepted norm, recognizing individual criminal responsibility for providing banking services of the type alleged in the Complaints." JA297 (Posner Decl.).[15]

Nor can petitioners plausibly allege the requisite *mens rea*. *See* Pet.App.39a (Jacobs, J.) (noting this alternative basis for dismissal). Petitioners do not allege that the Bank directly injured them; they instead allege that the Bank aided and abetted attacks conducted by others. To prevail on those claims, petitioners must show that the Bank acted with the *purpose* of supporting recognized violations of the law of nations, such as genocide and crimes against

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[15] Further underscoring the absence of a universal definition of "terrorism," several of the Palestinian organizations that petitioners have labeled "terrorist fronts" "received grants *from the United States government*" through USAID. *Gill*, 893 F. Supp. 2d at 561 (emphasis added).

humanity. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011). An allegation that a company *knowingly* "[did] business with" Hamas or a charity allegedly affiliated with Hamas "does not by itself demonstrate a purpose to support" genocide or crimes against humanity. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1025 (9th Cir. 2014).

Any allegation that the Bank acted with the purpose of facilitating crimes against humanity or genocide does not pass the straight-face test. The U.S. government has described the Bank as "a constructive partner" and "a lead[er] ... on anti-money laundering and combatting the financing of terrorism." U.S. *Linde* Br.20. There can be no plausible allegation that the Bank acted with the purpose of supporting genocide or crimes against humanity when it was working closely with the United States and its allies to fight terrorism and terrorist financing. *See* Pet.App.39a (Jacobs, J.).

### C. This Court Should Affirm the Judgment Outright Rather Than Remanding to the Second Circuit.

The United States essentially agrees with the Bank on the bottom-line conclusion that petitioners' claims must be dismissed because they are interfering with U.S. foreign policy and are barred by *Kiobel II*. But rather than urge the Court to resolve this litigation itself, the United States suggests that the Court should remand for the Second Circuit to address these issues without remanding to the District Court. U.S.Br.30-32. That unusual suggestion is, at most, a

second-best alternative that ignores the practical problem that the Second Circuit has already misapplied this Court's *Kiobel* principles in the international banking context.

This case has now been pending for *13 years*. As long as it remains pending, it will cast a pall over the Bank and the Jordanian economy, and will continue to generate friction with a critical U.S. ally that has been an indispensable partner in anti-terrorism efforts. If this Court were to remand to the Second Circuit, a final disposition likely would be reached *at the earliest* by 2019. Thirteen years of litigation is enough. Given the multiple fatal defects with petitioners' claims, all of which are amenable to resolution as a matter of law, the case should be dismissed now once and for all.

Moreover, a remand to the Second Circuit would need to be accompanied by a direction to consider the extraterritoriality issue afresh. In *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016), *pet. for cert. pending* No. 16-778, the Second Circuit suggested that it would find jurisdiction over an otherwise-extraterritorial ATS claim based solely on the fact that dollar-denominated transactions were cleared through New York. That dictum flouts this Court's decision in *Kiobel II* and the position of the United States. U.S.Br.28-29. While this Court could grant, vacate, and remand *Licci* in light of its disposition of this case,[16] it would need to be explicit that the Second Circuit should consider the "touch and

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[16] Although the Second Circuit rejected the bank's extraterritoriality argument in *Licci*, it dismissed the case under that court's no-corporate-liability rule. This Court appears to be holding the *Licci* petition pending its disposition of this case.

concern" issue anew. The far more straightforward course would be for this Court to decide the issue itself and use its undoubted authority to affirm on alternative ground to reaffirm its decision in *Kiobel II*.

## CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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